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# In The Supreme Court of the United States

**October Term, 1962**

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**No. 792**

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PAN-AMERICAN LIFE INSURANCE COMPANY,
*Petitioner,*

*vs.*

PEDRO MENENDEZ RODRIGUEZ
*Respondent.*

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PAN-AMERICAN LIFE INSURANCE COMPANY,
*Petitioner,*

*vs.*

MARIA CRISTINA VENTO JAIME,
*Respondent.*

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## BRIEF OF RESPONDENTS

This Brief is filed on behalf of Respondents, Pedro Menendez Rodriguez and Maria Cristina Vento Jaime, in reply to the Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit which reversed final judgments of the District Court dismissing their Complaints on the ground of FORUM NON CONVENIENS. The District Court had ruled that in the interest of justice to Respondents (who are refugees and would probably be executed if they returned to Cuba) their claim should be litigated in the Republic of Cuba (R-76, R-105).

Two grounds are set forth for the issuance of the Writ:

1. The decision of the Court of Appeals which relates to the doctrine of forum non conveniens is in conflict with applicable decisions of this court and other courts of appeal on the same matter.

2. The decision of the Court of Appeals which relates to the Act of State doctrine is in conflict with a number of decisions of this court and other courts of appeal on the same matter.

As to the first ground, an analysis of the facts shows no conflict with any other decisions of this Court or other Courts of Appeal on the same question, but, on the contrary, the decision follows the decisions of this Court.

As to the second ground, no determination or ruling was made by the District Court in its final judgments (R-76, R-77, R-105, R-106) either for or against Respondents on the application of the Act of State Doctrine and Cuban decrees to the facts. There was no hearing on the merits.

The sole ground for dismissal of the complaints in the District Court was the application of the doctrine of Forum Non Conveniens. (R. 76, R. 105).

The decision of the Court of Appeals specifically pointed this out. *Rodriguez v. Pan American Life Insurance Co.* (C.C.A. 5th 1962) 311 F. 2d 429 at P. 434.

> " . . . Although not specifically mentioned in the District Court's findings upon which its dismissal orders were based, running through each record is

> the contention of appellees that the merits of appellants' respective claims, for one reason or another, are controlled by the law of Cuba. In each case it is urged that the confiscatory and other decrees of the Castro government are binding, that appellants' rights, if any, have been expropriated by Castro; that they have no standing in court as proper parties; . . . "

The Court of Appeals in its decision recognized that the question had not been passed on by the District Court and was not the proper subject matter of review, stating at page 436:

> " . . . Our courts are not compelled by the Act of State doctrine to give force and effect to the decrees of the Castro government in Cuba. On the merits it was determined in *Banco* that the subject Cuban decrees were confiscatory and their effect was nullified by the trial court, which was affirmed on appeal.
>
> "It is for the District Court to determine upon development of all the facts, by summary judgment or otherwise, whether the Cuban decrees are confiscatory or whether the particular decrees are otherwise violative of fundamental concepts of justice and, therefore, without status, in these particular cases."

The Court of Appeals recognized and pointed out the obvious factual distinction between the present case and the case of *Banco Nacional de Cuba v. Sabbatino*, (C.C.A. 2d 1962) 307 F. 2d 845.

The decision of the United States Court of Appeals on the Act of State Doctrine as applied to the facts of the present case not only is not in conflict with applicable decisions of this court but the decision was in conformity therewith.

## STATEMENT OF THE CASE

Respondents, husband and wife, residents of Florida, filed companion cases in the Circuit Court for Hillsborough County, Florida for declaratory decrees under the provisions of Chapter 87 of the Florida Statutes against the Pan American Life Insurance Company. (Pedro, R. 11-34) (Maria, R. 83-88). The respondents, plaintiffs in the Circuit Court, will be referred to as Pedro and Maria respectively and petitioner, Pan American Life Insurance Company will hereinafter be referred to as Pan American.

The Complaints filed in the State Court by Pedro and Maria sought declaratory decrees that they were entitled to recover from Pan American the cash surrender values of their life insurance policies representing the premiums they had paid and built up by the payment of premiums since 1945. The complaints and policies were practically identical (Pedro R. 11-34) (Maria R. 83-88) except for the names in the policies and except for the fact that Pedro became a resident of Florida in January, 1959, and Maria in February, 1959.

The insuring agreements and English translations were attached to the complaints. The first page of the original policy covering Pedro appears at R. 8 and English translation appears at R. 16-34.

The complaints alleged that on January 5, 1945 Pan American Life Insurance Company entered into contracts insuring the lives of Pedro and Maria in the amount of $20,000.00 each. The policies provided for an annual premium of $1523.40 to be paid by each for twenty years. The policies were accepted by Pan American in New Orleans, Louisiana and contained, among other provisions, the following:

> "all the payments relative to this policy be they on the part of the company or the insured will be verified in the City of New Orleans in the legal money of the United States."

The policy contained a further provision:

> "This policy is exempt from any restrictions as to residence, travel, or occupation."

The policies contained provisions for automatic premium loans in the event of failure to pay premiums and also provided for the surrender of the insuring agreement for its cash value. The complaints further alleged that the premiums on the policies were paid for each year during the period from January 5, 1945 through January 5, 1958. The premiums due January 5, 1959 were not paid and the automatic premium loan provision came into effect with reference to the policy. Subsequent to January, 1959, after he had become a resident of Hillsborough County, Florida, Pedro on September 23, 1959 forwarded a check to Pan American in the amount of $2,941.47 to apply against the premium loans due January 5th, 1959. Pan American refused to accept the payment. Thereafter, on July, 1960 Pedro and Maria requested the surrender of their policies for their cash values either in New Orleans or Tampa. Pan American refused to permit the payment of the premiums and has refused to permit the surrender of the policies for their cash values. The complaints prayed for a declaratory decree that Pedro and Maria were entitled to surrender of their policies of insurance either in Tampa or New Orleans in monies of the United States in accordance with the schedules set forth in the insuring agreements.

The original policies bear the signature of the President and Secretary of Pan American. Premiums are to be paid at the office of Pan American at New Orleans but the company can appoint properly authorized persons to receive premiums in other places on or before due date. The policy can be amended or modified only by a written consent of the company signed by the President, Vice-President, Secretary or Actuary. It provides (R. 21-22):

> "This policy and its respective solicitude (application), a copy of which is added to this contract and forms a part of the same, constitute the whole contract, which cannot be changed or modified except with the written consent of the company signed by the President, Vice-President, Secretary or Actuary; nor any offer or representation relative to the contract made at any time by any persons except the officials of this company aforementioned will be obligatory for the company."

No change of beneficiary shall be effected until endorsed at the principal office of the company at New Orleans (R. 21). Settlement under the policies shall not be effective until proof of death is filed at the principal office of the company at New Orleans. (R. 22-23).

Pan American removed the cause from the State Court to the U.S. District Court on the ground of Diversity of citizenship, filed its answer *and then after removing the cause on the ground that the U. S. District Court had jurisdiction,* filed its motion that the District Court should decline jurisdiction on the ground that the principal witnesses for the defendant were in Cuba and that defense of the action in the United States District Court in Tampa where the plaintiffs resided would impose an unnecessary burden on Pan American (R. 57-58), little consideration being given

to the policyholders who were merely attempting to get back the surrender value of the policies representing the monies they had paid Pan American. Pan American in addition to moving to dismiss filed answer setting forth specifically the following: (Pedro, R. 35-51) (Maria, R. 91-99).

(A) Pedro and Maria were citizens of Cuba where the policy was to be performed (even though on the face of the policy it is payable in New Orleans in money of the United States); that all rights under the policy were determined under Cuban law and they should be remitted to the appropriate courts of Cuba for relief and the case dismissed.

(B) On April 9, 1960 (long after they had become residents of Hillsborough County, Florida) the Cuban Government decreed that the cash surrender value should be paid in the national money of Cuba in Havana.

(C) On September 29, 1959 (long after Pedro and Maria had been residents of Hillsborough County) the Cuban Government decreed it to be a felony if the mones were paid to policyholders.

(D) On April 7, 1959 (while Pedro was a resident of Hillsborough County, Florida) the properties of Pedro were confiscated in Cuba by publishing his name in the official register, and he is not the owner of the policy.

In the case of Maria, the defendant did not plead a Cuban decree confiscating her properties.

The Court refused to remand the cause to the State Court and entered an order continuing the cause pending the submission of proof in support of the positions of the parties under the doctrine of forum non conveniens. (R. 59)

## PROOF FILED BY PEDRO AND MARIA

Pedro and Maria (Pedro, R. 68-73) (Maria R. 101-105) filed Affidavits. Request for Admissions were also propounded (R. 60-66) and answered by Pan American (R. 66-68). The affidavit of Pedro set forth that he has been a resident of Tampa, Florida since January, 1959. On January 5, 1945 he entered into the insuring agreement with Pan American insuring his life for $20,000.00. The policy contained the express provision that all payments relative to the policy will be verified in the City of New Orleans in legal money of the United States of America. One of the considerations for the purchase of the policy was that the sums would be payable in United States money at New Orleans. Pedro relied upon the stability of the American dollar. The original premium and subsequent premiums were paid in U. S. money.

The policy contained the provisions that the company could appoint other people to receive premiums in other places. Sometime during the year 1952 Pan American stated that it would accept premiums in Cuban dollars which at the time were freely convertible and interchangeable with American dollars.

All premiums were paid on the policies through January, 1959. The January, 1959 premium was covered by the automatic premium loan provision. On September 23, 1959 Pedro met the agent of Pan American in Tampa, Florida and was advised that he could pay the premium loan on his policy and Maria's policy and thereafter he paid the company by check which was accepted. On October 6, 1959 Pan American returned the check (R. 63) refusing to accept payment with a letter requiring the policy be sent to Havana, Cuba for sur-

render of its cash value and suggesting he then pay Pan American in U. S. Currency the cash value of the policies at the time of their surrender in Cuba. The letter from the company appears at R. 63-65.

Pedro's affidavit further set forth that the insurance agreement provided that it could not be changed or modified except with the written consent of the company signed by the President, Vice-President, Secretary or Actuary and at no time has Pan American ever amended its policy to provide that the cash surrender value shall be paid in Cuban dollars only nor has Pan American ever purported to amend or modify its policy in any respect. In July, 1960 Pedro directed his attorney to request the surrender of the policy for its cash surrender value in American money either in New Orleans or Tampa but Pan American refused.

Pedro's affidavit further set forth that he is more than 70 years of age and has been growing tobacco in Cuba for more than 40 years. He was elected to the Senate from the Province of Pinal Del Rio and served during the year 1958 and 1959. The regime of Fidel Castro, a communistic revolutionary, came into power and he was forced to flee for his life. Constitutional government was abandoned. In April, 1959, while he was a resident of Hillsborough County, Florida, by the mere publication of his name in the official gazette, his property in Cuba was declared confiscated. He acquired his property honestly and as a tobacco farmer for over 40 years. No property was ever acquired in any fraudulent or dishonest manner and the confiscation of his property was completely without justification. He has no recourse to any judicial tribunals in Cuba. There is no longer any constitutional government or inde-

pendent judiciary system to which he can apply for relief. All constitutional guarantees and the independent judiciary has been destroyed. Any relief he might seek in Cuba would be illusory.

There is no dispute as to the facts in the case. The issue is whether the Cuban Government may arbitrarily confiscate a claim of a resident of Florida against an American company doing business in Florida by decree made long after Pedro became a resident of Hillsborough County. To require him to litigate in Cuba would be in substance recognizing and giving effect to the decree of confiscation.

The affidavit of Maria (R. 101-104) sets forth substantially the same facts as Pedro's affidavit.

In the request for admissions and answers (R. 60-66) Pan American admitted the insuring agreements, admitted that the premiums had been received for each year during the period from January 5, 1945 through January 5, 1958, and admitted that neither the President, Vice-President, Secretary or Actuary of Pan American has ever executed any change or modification in the Insuring Agreement. Pan American admitted receipt of Pedro's checks on September 23, 1959 in the amount of $2,941.17 but claimed the check was only conditionally accepted. Pan American further admitted refusal to surrender the policy either in Tampa or New Orleans and admitted the cash surrender value of the policies to be over $12,000 each.

Pan American's only answer to the affidavits and admissions was the affidavit of William A. Gillen (R. 73-75) to the claim of Pedro stating that on April 7, 1959 (after Pedro was a resident of Hillsborough Coun-

ty) Pedro's property in Cuba was confiscated and that on September 20, 1960 the Republic of Cuba demanded Pan American pay the cash surrender value of the policies to it in Cuba. The affidavit of Pan American did not set forth any issue of fact which required witnesses from Cuba or show any inconvenience whatsoever in litigating the issues in Florida.

The U. S. District Court entered Final Judgments (R. 76-78) (R. 105-106) dismissing the Complaints on the ground that for the convenience of the parties and witnesses and in the interest of justice and claims should properly be litigated and disposed of in the Republic of Cuba. Appeals were taken by Pedro and Maria, and an order was entered upon their motion consolidating their appeals. The judgment of the District Court was reversed. The Court of Appeals ruled that it was improper to dismiss the Complaint filed by refugees from Castro's Cuba and relegating them to Cuba in the absence of showing that they could obtain justice in the Courts of Cuba. The Court of Appeals ruled there must be a clear showing that an appropriate alternative forum exists before the doctrine of Forum Non Conveniens is applied to summarily dismiss a plaintiff without hearing on the merits.

## QUESTIONS PRESENTED

The following questions were presented by the Petition for Writ of Certiorari.

1. Does the decision of the Court of Appeals reversing the lower court's holding that respondents, residents of Florida, may properly litigate their claim against Pan American on the merits in the Florida Courts without being relegated to Cuba where they

could not get a trial, much less a fair trial, conflict with any applicable decision of this Court or decisions of other Courts of Appeal on the same matter.

2. Does the decision of the Court of Appeals holding that our Courts are not compelled by the Act of State Doctrine to give force and effect to the confiscatory decrees of Castro's government in Cuba and referring the case to the District Court for determination of the facts and to determine the applicability of decrees of Castro's Cuba to the facts as developed conflict with any applicable decision of this Court or decision of other Courts of Appeals on the same matter.

# ARGUMENT

## POINT I.

THERE ARE NO DECISIONS OF THIS COURT OR OTHER COURTS OF APPEAL APPLYING THE DOCTRINE OF FORUM NON CONVENIENS TO FORCE A RESIDENT SUING IN HIS OWN RIGHT TO BE DEPORTED TO A FOREIGN COUNTRY WHERE ALL VESTIGES OF CONSTITUTIONAL GOVERNMENT AND RIGHT TO FAIR TRIAL HAVE BEEN DESTROYED, WHERE THEY WOULD PROBABLY BE EXECUTED AND WHERE PEDRO'S PROPERTY IS THE SUBJECT OF A CONFISCATION DECREE MADE AFTER HE BECAME A FLORIDA RESIDENT.

Pedro and Maria became residents of Florida in January, 1959, and February, 1959, respectively. They are merely trying to recover from Pan American the cash surrender value of their life insurance policies representing the premiums they have paid since 1945. No witnesses from Cuba are necessary, nor is any hardship whatsoever shown to Pan American in litigating the issues on the merits in Florida. There is no inconvenience or injustice to Pan American in litigating in Florida with reference to cash surrender values.

The doctrine of Forum Non Conveniens has never been applied in a civil case to face a resident suing in his own right to be deported to a foreign country, much less a foreign country where right of fair trial, constitutional government, and an independent judiciary have been destroyed. Petitioner has failed to cite a single decided authority supporting this proposition. The decision of the Court of Appeals in applying the equitable principles underlying the doctrine of Forum

Non Conveniens, namely, that there be at least two forums open to the plaintiff and that the alternative forum shall be one where the plaintiff can obtain justice, followed the doctrines expressed in the decided cases, both civil and admiralty.

As was stated in the leading case, *Gulf Oil Company v. Gilbert*, 330 U. S. 501, 91 L. Ed. 1055, 67 S. Ct. 839, at page 508:

> "The Court will weigh relative advantages and obstacles to fair trial . . . "

In the absence of strong equities in favor of a defendant, the plaintiff's choice of forum should rarely be disturbed. The requirement that two forums be open to plaintiff before the rule is applied would be illusory if the second forum were in substance no forum at all, if the second forum did not provide for a fair trial, much less a forum where the plaintiff would probably be executed if he attempted to present his case. It is general knowledge that a fair trial cannot be obtained in Cuba.

Under the doctrine of the decided cases, both civil and admiralty, the plaintiff's choice of forum is rarely disturbed. Only when justice would be served by declining jurisdiction is the doctrine applied. The doctrine of Forum Non Conveniens is never applied as an instrument of injustice. It has never been applied to deprive a plaintiff of all relief.

The civil and admiralty cases decline jurisdiction only when equitable considerations require that plaintiff be relegated to another forum. The doctrine presupposes at least two forums. *Tivoli Realty Inc. v. Interstate Circuit Inc.*, 167 F. 2d 155; *The Belgenland,*

(1885) 114 U.S. 355; *Motor Distributors, Ltd. v. Olaf Pedersen's Rederi A/S,* (C.C.A. 5th 1956) 239 F. 2d 463; *North Branch Products, Inc. v. Fischer* (D.C. Cir. 1960) 284 F. 2d 611, *cert. den.*, 365 U.S. 827; *Burt v. Isthmus Development Company* (C.C.A. 5th 1955) 218 F. 2d 353; *The Wilga,* (C.C.A. 2d) 113 F. 2d 646.

Under the provisions of Title 42, Section 1981, United States Code the respondents, policy holders, residing in Florida were entitled to enforce their contractual rights in the same manner as other citizens. To deny them access to the Courts of the United States would render this statute nugatory.

In cases under similar circumstances, the Courts of the State of Florida have refused to dismiss actions brought under similar circumstances on the same grounds urged by Pan American herein. The authorities are *Confederation of Canada Life Insurance Company v. Arminam* (Fla. 1962) 135 So. 2d 867, certiorari denied by Florida Supreme Court, 144 So. 2d 809, and *Crown Life Insurance Co. v. Garay* (Fla. 1962) 141 So. 2d 633, certiorari denied by Florida Supreme Court, 143 So. 2d 492.

Pan American cannot by the device of removal to the United States District Court deprive plaintiffs of their rights.

## POINT II.

THERE ARE NO DECISIONS OF THIS COURT OR OTHER COURTS OF APPEAL HOLDING THAT OUR COURTS ARE BOUND BY THE ACT OF STATE DOCTRINE TO GIVE FORCE AND EFFECT TO THE DECREES OF THE CASTRO GOVERNMENT IN CUBA MADE AFTER PEDRO AND MARIA BECAME RESIDENTS OF FLORIDA AS TO CONTRACT RIGHTS WITH A SITUS IN THE UNITED STATES.

In January, 1959 Pedro became a resident of Florida. His wife followed a month later. In September, 1959 he transacted business with Pan American through its agent in Tampa, Florida. While a resident of the United States, the Cuban government purported to arbitrarily confiscate his properties by the mere publication of his name in the Official Gazette, together with a long list, on April 7, 1959, copy of which is attached to Pan American's Answer. (R. 55-56)

Pedro had been a tobacco farmer for more than forty years. His property had been acquired honestly as a result of diligent work and ability as a tobacco farmer. He entered politics in Cuba to serve the people and without desire for personal gain.

The arbitrary decree of the Cuban government made in April, 1959, long after he had resided in Florida, could not affect the debt owed to him in Florida by an American Company qualified to do business in Florida. To require Plaintiff to litigate in Cuba would be in substance granting the arbitrary confiscatory decree in Cuba extraterritorial effect beyond the Republic of Cuba.

The right of a Florida resident to collect the cash surrender value of his policy from an American company doing business in Florida obviously could not have any situs in Cuba. See *Chicago R. I. & P. R. Co. v. Sturm*, 174 U. S. 710, 43 L. Ed. 1144, 19 S. Ct. 797.

Contrary to the representation in the petition, the contract right of a Florida resident against an American Company doing business in Florida could obviously have no situs in Cuba.

The protection of Title 42, Section 1981, United States Code, extends to all persons within the jurisdiction of the United States giving them full and equal benefit of all laws and proceedings for the security of persons and property, including the right to enforce their contracts.

The issue in connection with the Act of State doctrine presented on the petition for writ of certiorari was never decided by the United States District Judge in his decision nor was it decided by the Court of Appeals in its decision. The Court of Appeals in its opinion pointed out that the appellee, petitioner herein, raised the point that the decrees of the Castro Government were binding either as an adjunct of the Forum Non Conveniens doctrine or as a separate proposition asserted in the name of the Act of State doctrine. The Court pointed out that it was for the District Court to determine upon development of all the facts, by summary judgment or otherwise, whether the Cuban decrees are confiscatory or whether the particular decrees are otherwise violative of the fundamental concepts of justice and, therefore, without status, in these particular cases.

The Court of Appeals in its decision admitted that there were factual distinctions between the case at bar and the case of *Banco Nacional de Cuba v. Sabbatino,* 307 F. 2d 845. The decision of the Court of Appeals merely referred the cause back to the District Court for further determination of the facts inasmuch as the Cuban decrees had never been ruled upon or admitted into evidence. The only answer to the plaintiffs' affidavits and the admissions by Pan American appearing in the record in Pedro's case was the answering affi-

davit of William A. Gillen, attorney for Pan American, (R. 73-74) to the effect that on April 7, 1959 (after Pedro was a resident of Florida) Pedro's property in Cuba was confiscated and on September 20, 1960 Castro's Cuba demanded Pan American pay the cash surrender value of the policies to it in Cuba. No answering affidavit was filed by Pan American in the case of Maria, and the facts as to her case are uncontroverted.

However, upon the facts presented in this case, the contract right of a Florida resident against a company authorized to do business in Florida, no confiscatory decree of the Republic of Cuba, made after respondents were residents of Florida, would be given extra-territorial effect. This court has clearly held that foreign acts of confiscation will not be given extra-territorial effect beyond the jurisdiction of the foreign sovereign. *Baglin v. Cusenier Co.*, 221 U. S. 580, 31 S. Ct. 669, 55 L. Ed. 863; *Ingenohl v. Walter E. Olsen & Co.*, 273 U. S. 541, 47 S. Ct. 451, 71 L. Ed. 762.

There is no distinction between the position of the Carthusian Monks who were attempting to protect their property rights in the United States from a confiscatory decree in France in *Baglin v. Cusenier Co., supra,* and the case of Pedro and Maria attempting to obtain a hearing on the merits of their contract rights to recover the cash surrender values of their insurance built up through the years by payment of premiums.

The most recent holding on the refusal to give extra-territorial effect to a decree of confiscation is *Zwack v. Kraus & Co.* (C.C.A. 2d 1956) 237 F. 2d 255 in which a decree of confiscation by the Hungarian Government was denied effect as to assets having a situs in the United States. The Court state at page 259:

"It is clear that the Hungarian government could not directly seize the assets which have a situs in the state of the forum. To allow it to do so indirectly through confiscation of firm ownership would be to give its decree extra-territorial effect and thereby emasculate the public policy of the forum against confiscation."

## CONCLUSION

The decision of the Court of Appeals being in conformity with and not in conflict with any decisions of this Court or other courts of appeal, as applied to the factual situation presented, it is respectfully submitted that the petition for writ of certiorari should be denied.

Dated at Tampa, Florida this —— day of March, 1963.

Respectfully submitted,

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